FOR ARGUMENT

No. 96-651

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

JAMES E. GILBERT, *et al.*,

*Petitioners,*

*vs.*

RICHARD J. HOMAR,

*Respondent.*

*On Writ of Certiorari to the United States Court of Appeals for the Third Circuit*

## BRIEF OF *AMICUS CURIAE* THE PENNSYLVANIA STATE LODGE, FRATERNAL ORDER OF POLICE IN SUPPORT OF RESPONDENT

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## TABLE OF CONTENTS


| | *Page* |
|---|---|
| Table of Citations ..... | ii |
| Interest of the *Amicus Curiae* ..... | 1 |
| Summary of Argument ..... | 2 |
| Argument ..... | 3 |
| Prior To Suspension Without Pay, Public Employees Are Entitled To A Meaningful Opportunity to Respond To The Charges Brought Against Them; The Failure To Accord Them That Opportunity Violates Their Rights Under The Due Process Clause. ..... | 3 |
| A. The public employer's burden is not overwhelming, and the interest in removing delinquent public employees is adequately protected. ..... | 4 |
| B. Public employees have a right to predeprivation procedural due process because the risk of an erroneous suspension is substantial and irreparable. ..... | 6 |
| C. The process due accused employees requires that a predeprivation hearing take place prior to suspension without pay. ..... | 9 |
| Conclusion ..... | 12 |

*Contents*

*Page*

## TABLE OF CITATIONS

**Cases Cited:**

*Arnett v. Kennedy*, 416 U.S. 134 (1974) ..... 9

*Barry v. Barchi*, 443 U.S. 55 (1979) ..... 9

*Boddie v. Connecticut*, 408 U.S. 371 (1971) ..... 9

*Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) ..... 3, 4, 5, 6, 11, 12

*Engdahl v. Department of the Navy*, 900 F.2d 1572 (Fed. Cir. 1990) ..... 10

*Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987) ... 10

*Federal Deposit Insurance Corporation v. Mallen*, 486 U.S. 230 (1988) ..... 4

*Garrity v. New Jersey*, 385 U.S. 493 (1967) ..... 5

*Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987) ..... 4

*Goss v. Lopez*, 419 U.S. 565 (1975) ..... 10

*Lefkowitz v. Turley*, 414 U.S. 70 (1973) ..... 10

*Matthews v. Eldridge*, 424 U.S. 319 (1976) ..... 4

*Contents*


| | Page |
|---|---|
| *Morrissey v. Brewer*, 408 U.S. 471 (1972) ..... | 4 |
| *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306 (1950) ..... | 9 |
| **United States Constitution Cited:** | |
| U.S. Const., amend. XIV, § 1 ..... | 3 |

The *amicus curiae* through the undersigned attorneys, respectfully submits this brief in support of respondent, Richard J. Homar. Because the question presented in the present controversy is of vital importance to the *amicus* and its members, consent of the parties has been sought and obtained for the filing of a brief to assist the Court.[1]

## INTEREST OF THE *AMICUS CURIAE*

The *amicus*, the Pennsylvania State Lodge, Fraternal Order of Police, represents police officers throughout the Commonwealth of Pennsylvania in collective bargaining and employment disputes. The *amicus* and its members have substantial interest in legal issues affecting state and local government employees. Any deprivation within the Commonwealth of Pennsylvania of a public employee's rights to procedural due process and the repercussions therefrom will directly impact the rights and privileges of the *amicus'* membership.

The Court of Appeals' holding that a public sector employer must provide its employees with notice and an opportunity to be heard *prior* to any suspension without pay is a correct interpretation of the barest and most minimal procedures due such employees under the Due Process Clause. The decision appropriately defends the interests of public sector employees in their employment and accompanying income against unwarranted deprivation without due process. The threat of suspension without pay at the will of an employer would constitute an intrusion on the rights of the police officer membership of the *amicus* in addition to the rights of all public sector employees.

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1. The parties' letters of consent to filing of a brief by *amicus* are filed with the Clerk of Court.

A post-suspension hearing does not eliminate the employer's essential obligation to provide a hearing before employees are deprived of significant property interests. When an employee is charged with misconduct and immediately suspended from duty, a post-suspension remedy cannot restore the employee to where he or she was prior to the suspension. The Due Process Clause bars the imposition of suspension without pay prior to precautionary scrutiny of underlying allegations against any accused employee.

## SUMMARY OF ARGUMENT

Prior to deprivation of a valid property interest in employment, a public employee is entitled to notice of charges, an explanation of evidence and a meaningful opportunity to respond. The light burden on the employer is to provide notice of the reasons for considering disciplinary action and to hear the employee's explanation.

An employee who is suspended without pay has the substantial burden to find a new source of income and rebuild a career. The police officer members of the *amicus* are placed in especially difficult circumstances when suspended by their public employers because public confidence is a considerable factor in a police officer's effectiveness. Once suspended, the officer can never be made whole.

The Court of Appeals' decision preserves a meaningful opportunity for an employee to be heard prior to the imposition of suspension without pay. The procedure endorsed by the Court of Appeals here is not a departure from fundamental due process requirements.

## ARGUMENT

### PRIOR TO SUSPENSION WITHOUT PAY, PUBLIC EMPLOYEES ARE ENTITLED TO A MEANINGFUL OPPORTUNITY TO RESPOND TO THE CHARGES BROUGHT AGAINST THEM; THE FAILURE TO ACCORD THEM THAT OPPORTUNITY VIOLATES THEIR RIGHTS UNDER THE DUE PROCESS CLAUSE.

"No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const., amend. XIV, § 1. The due process issue in the present controversy is whether the respondent, Richard J. Homar, received adequate predeprivation protection. Homar has a property interest in his employment as a campus police officer for East Stroudsburg State University, and he was deprived of compensation for that employment without hearing.

The Court of Appeals correctly determined that due process requires a hearing before an individual can be deprived of his or her property interest in continued public employment. This essential tenant of constitutional law was memorialized in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), yet ignored by the public sector employer in this instance. The power to indefinitely suspend employees without pay is an almost unassailable weapon for public sector employers against which their employees will have no adequate remedy. A reversal of the Court of Appeals here would threaten the fundamental property rights of all public employees.

In *Loudermill*, the Court held that prior to deprivation of a valid property interest in employment, a public employee is entitled to notice of charges, an explanation of evidence and a meaningful opportunity to respond. Interpreting the parameters of *Loudermill*, the Court of Appeals for the Third Circuit

accurately stated that a predeprivation hearing "is necessary, even if extensive post-deprivation remedies are afforded." *Gniotek v. City of Philadelphia*, 808 F.2d 241, 243, (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987). Still, there may be some cases where the governmental interest is significant, the evidentiary basis of the action is straightforward and a prompt decision is necessary. *Federal Deposit Insurance Corporation v. Mallen*, 486 U.S. 230 (1988).

There are competing interests to consider in determining what process is due public employees facing possible suspension of wages. These interests include: the significance of the employee's property interest in retaining compensation and employment, the governmental interest in the expedient removal of a delinquent employee, the avoidance of administrative burden, and the risk of an erroneous determination. *See Matthews v. Eldridge*, 424 U.S. 319 (1976). "[D]ue process is flexible and calls for procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The measure of protection due a public employee when wage suspension is contemplated is determined by balancing the practical consequences and burdens which fall to the parties involved.

**A. The public employer's burden is not overwhelming, and the interest in removing delinquent public employees is adequately protected.**

Initially, it is worth exploring the level of protection that a pre-suspension hearing provides in light of the governmental effort involved in holding such a hearing. The fundamental requirements of *Loudermill* are that the employer notify the employee and afford the employee an opportunity to respond. In this regard, the administrative burden on the employer is relatively light.

In *Loudermill*, the Court held that individuals with protected property interest in continued public employment cannot be dismissed without due process. All that is required is notice of any accusations, a summary of the evidence supporting them and an opportunity to respond prior to the deprivation of protected interest. A *full* due process hearing can occur at a later time. *Loudermill* 470 U.S. at 545.

Pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967), an employer can compel an employee to submit to administrative interrogation with certain conditions: the statements made and their fruits cannot be used in a criminal investigation or prosecution and the use of any statements is limited to internal disciplinary action. Refusal to answer questions after being apprised of the *Garrity* warnings can result in discipline, up to and including dismissal.

An employer can exercise the *Garrity* warnings at a pre-suspension hearing to determine the propriety or impropriety of suspension without pay. Prior to questioning, an employer need only inform the employee that the questioning concerns allegations and evidence and their relation to administrative matters and business of the public employer, that the questioning is not directed toward instituting criminal prosecution or for the purpose of securing additional evidence for a pending investigation or criminal action, and that any self-incriminating information and any fruits thereof cannot be used in criminal proceedings against the employee.

All matters discussed after *Garrity* warnings issue are to be administrative in nature and concern only the business of the public employer and its relationship with the employee; the employer can hold an employee responsible for not answering the questions truthfully or completely. After a public employer conducts a *Loudermill* hearing, the employer is entitled to

impose any appropriate preliminary discipline and decide if any deprivation is necessary. Thus, employers' interest in maintaining the integrity of the public institution by suspending delinquent employees is adequately protected.

In the present matter, the Court of Appeals did not ask that the public employer continue to pay an employee whose behavior warranted suspension without pay. Any concern that employees with outstanding criminal charges will be permitted to work was addressed by the suggestion from this Court that "in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending *with pay*." *Loudermill*, 470 U.S. at 544-45 (emphasis added) (footnote omitted). All material public safety concerns are addressed because an employee may be suspended with pay until a *Loudermill* hearing is arranged. If a public sector employer should choose to ignore this practical solution, it is not permitted to blatantly disregard the due process requirement that public employees cannot be suspended without pay prior to a *Loudermill* hearing.

**B. Public employees have a right to predeprivation procedural due process because the risk of an erroneous suspension is substantial and irreparable.**

All public employees are entrusted with some degree of civic responsibility; and police officers are held to an especially high standard in this regard. The primary duty of police officers is to maintain safety and security in the communities they serve. Police officers are exposed to the criminal elements of society regularly, and they are extremely visible to the general public as guardians and protectors of the law. As a result, any allegations of misconduct against police officers become matters of public record. Invariably such allegations are the subjects of articles in newspapers as well as radio and television newscasts. This

media coverage in turn influences public opinion, and the accused police officers' professional reputations are forever tarnished.

Moreover once charges are brought against police officers, it is extraordinarily difficult for the officers to obtain fair treatment from their employers because of the publicity such charges generate. Public employers are naturally beholden to public opinion. In many cases the individuals deciding the fate of maligned police officers are elected officials politically motivated to abandon employees in favor of public sentiment. Additionally, false allegations are a realistic concern for police officers because they are exposed to many uncommon situations on the job.

Due to First Amendment concerns, police officers are not protected from adverse media coverage which generally serves to destroy their public image as well as their private lives. Police officers like all similarly situated public employees are, however, entitled to hearings before they are deprived of their public employment. Permitting public employers to suspend accused police officers before they are afforded an opportunity to respond to charges, as proposed by petitioners and their supporting *amici*, would put the immediate job security of all police officers at risk and ultimately jeopardize the safety of the masses they protect.

The Court must recognize that police officers are under intense scrutiny and that the public nature of a police officer suspension does irreparable damage to the suspended officer's integrity and reputation. A pre-suspension hearing is a minimal safeguard against the devastation that such a disgraceful suspension will cause. Police officers and other public employees must be afforded the opportunity to present a defense against charges in a predeprivation procedure to avoid the risk of erroneous suspension.

The turmoil caused by a loss of wages is also substantial. Greater weight must be placed on the public employee's substantial interest in the accuracy of a pre-suspension hearing. After wages are suspended, the employee might wait months before the case is resolved and the risk that a wrongfully suspended employee will be subject to lost wages and a lengthy wait for exoneration is intolerable.

Public employees suspended without pay are deprived of their livelihood and wages which might be the only means to provide sustenance for their families. During suspension, the employees' search for work may be significantly impaired by the charges against them, or by the possibility that they might return to public employment if the suspension is lifted. Access to public assistance might also be problematic because of the pending charges. Without an alternative source of income, such employees will be hard pressed to meet living expenses.

Moreover, there is no certainty that an unjustly suspended employee will ever be made whole. The postponement of wages, the personal consequences of the suspension and the loss of opportunity to work can never be paid back. The fact that such drastic circumstances might befall an unjustly punished employee is not acceptable. Nonetheless, petitioners and their supporting *amici* seek a result where the wages of public employees can be suspended without any meaningful opportunity to present defenses against charges.

The Due Process Clause, as interpreted by the Court of Appeals in this matter and this Court in *Loudermill*, protects public employees from undue harm. To overturn the Court of Appeals' interpretation would mean that Federal, State, County and Municipal employees across the nation will be subject to unpaid suspension for indefinite periods without reason. Due process requires that such action shall not occur until the

employee has been granted at least the "opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Company*, 339 U.S. 306, 313 (1950).

Essentially, all the government employer must do is notify the employee of the reasons for considering discipline without pay and thereafter, give that employee some opportunity to defend himself or herself against any allegations. When compared to the monumental burden on the employee who suffers the unpaid suspension, such concerns are minuscule. A suspended employee has to consider how he or she will meet living expenses, try to eradicate the inevitable damage to reputation that such a suspension will cause, and start to rebuild his or her career. Even assuming the suspension is overturned, the employee is reinstated and awarded back pay, he or she cannot be made whole. There is no way to undo the damage done to his or her career because public employees are dependent upon their relationships with the community in which they serve.

To be truly meaningful, an opportunity for a hearing must be afforded at a time when the potentially irreparable and substantial harm caused by suspension can still be avoided. *See Barry v. Barchi*, 443 U.S. 55, 74 (1979) (Brennan, J., concurring in part).

**C. The process due accused employees requires that a predeprivation hearing take place prior to suspension without pay.**

The government cannot authorize the deprivation of an employee's property interest in public employment without certain procedural safeguards. *Arnett v. Kennedy*, 416 U.S. 134 (1974). The Due Process Clause requires at least a hearing before an individual is deprived of a property interest. *Boddie v. Connecticut*, 408 U.S. 371 (1971).

In *Everett v. Napper*, 833 F.2d 1507 (11th Cir. 1987), the Court of Appeals for the Eleventh Circuit determined that a firefighter was entitled to a pre-suspension hearing because the suspension was without pay. The due process requirement for a pre-suspension hearing was also maintained in *Engdahl v. Department of the Navy*, 900 F.2d 1572 (Fed. Cir. 1990), where the court found that a Navy electrician charged with indecent assault was afforded adequate procedural due process because he had the opportunity to rebut the basis of a proposed suspension at a meeting specifically scheduled for that purpose. Indeed, a hearing is required prior to the deprivation of compensation for employment because such an action takes away a principal interest an employee has in his or her job.

Petitioners and their supporting *amici*, contend that a post-deprivation hearing suffices. The Court has considered the severity of depriving an individual of his or her livelihood and pointed to two significant factors that weigh in favor of holding a hearing before depriving an employee. One consideration is the burden on the employee to find similar employment. *Lefkowitz v. Turley*, 414 U.S. 70 (1973). A second consideration is the interest in giving an employee the opportunity to present a case in defense of mounting charges so that an accurate and fair decision regarding impending deprivation or reconciliation can be made. *Goss v. Lopez*, 419 U.S. 565 (1975).

The present matter illustrates the need for such considerations. The employer implemented suspension without pay and did not afford any procedural guard against the loss of employment and compensation. The suspension was based solely upon a criminal complaint. The employee was not fully apprised of the charges of misconduct against him prior to suspension even though the evidence included alleged admissions. Furthermore, all criminal charges were eventually dismissed.

If a governmental employer seeks to suspend the pay of an employee for any reason, such employer is bound to provide due process by holding a hearing to determine the propriety of such suspension. This requirement is plainly stated in *Loudermill* as follows:

> The essential requirements of due process, and all that respondents [employees] seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.

*Loudermill*, 470 U.S. at 546.

Regardless of the exigency with which a public employer perceives its need to remove an employee either temporarily or permanently, that employer does not have the capacity to ignore the Due Process Clause. A suspension of compensation is not permitted without due process.

> The governmental interests in **immediate** termination does **not** outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a

> qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counter-productive step of forcing its employees onto the welfare rolls.

*Loudermill*, 470 U.S. at 544. The procedure endorsed by the Court of Appeals here is not a departure from the very basic due process requirements set forth in *Loudermill*.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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